No. 42543-2-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

GARY G. WALSTON and DONNA WALSTON,
husband and wife,

Appellants,

v.

THE BOEING COMPANY,

Respondent.

BRIEF OF AMICUS CURIAE WASHINGTON STATE LABOR COUNCIL

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A. IDENTITY AND INTEREST OF AMICUS CURIAE

RAP 13.4(h) and 10.3(e) require an amicus curiae to describe its interest in a case before the Court. The Washington State Labor Council ("WSLC") is a non-profit organization dedicated to protecting and strengthening the rights and conditions of working people and their families. As it has expressed on its website, the WSLC has a particular concern regarding chemically-related injuries. The WSLC represents and provides services for hundreds of local unions and trade councils throughout Washington State. Membership is voluntary and open to all union locals and councils that are affiliated with the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). Some other unions outside of the AFL-CIO may also join.

Currently, more than 600 local unions affiliate with the WSLC. That number represents approximately 400,000 rank-and-file union members in Washington. Those unions include asbestos workers, engineers, electrical workers, boilermakers, bricklayers, firefighters, farm workers, flight attendants, and many more. In fact, the WSLC is the largest labor organization in Washington and is the only organization representing all AFL-CIO unions in the state.

The WSLC supports its members in a number of ways. It focuses on legislative advocacy, political action, communications and media

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relations, and campaign organization. The WSLC was actively involved in the enactment of the Worker and Community Right to Know legislation. In addition to the programs referenced above, the WSLC also provides education and research support to its members, to help them better organize. In all, the WSLC serves as the "voice of labor" in this state, and it works to protect the rights and interests of its members.

The WSLC and its constituent members have a direct interest in this Court's application of RCW 51.24.020 and in protecting workers from their employer's intentional torts.

B. STATEMENT OF THE CASE

The WSLC acknowledges the Statement of the Case in the briefs of the appellants Gary and Donna Walston and respondent Boeing Company ("Boeing"). The WSLC confines its argument to the interpretation of the phrase "deliberate intention" as it appears in RCW 51.24.020.

C. ARGUMENT

(1) Washington's Treatment of Deliberate Intention in the Toxic Context

Normally a worker who suffers injury while in the workplace is limited to the exclusive remedy of the Industrial Insurance Act. RCW

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51.04.010. However, RCW 51.24.020 allows for workers to sue their employers for intentional torts, stating:

> If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

Id.

Prior to our Supreme Court's decision in *Birklid v. Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995), Washington decisions permitting a claim under this statute were exceedingly rare. Washington courts concluded that the employer had to intend the worker's *injury*, not just the tort. *See, e.g., Delthony v. Standard Furniture Co.*, 119 Wash. 298, 300, 205 Pac. 379 (1922); *Foster v. Allsop Automatic Inc.*, 86 Wn.2d 579, 584, 547 P.2d 856 (1976). This severe restriction on claims under RCW 51.24.020 ended with *Birklid* where our Supreme Court in a toxic exposure case held that the plaintiffs stated a claim under RCW 51.24.020 for their injuries sustained when Boeing exposed them to toxic fumes from a resin. The Court there noted that "Boeing here knew in advance its workers would become ill from the phenol-formaldehyde fumes, yet put the new resin into production." *Id.* at 863. The Court declined to adopt two alternative versions of "deliberate injury," either a "substantial

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certainty"[1] or "conscious weighing"[2] test for deliberate injury and instead defined deliberate injury as meaning "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Id.* at 865.

Although nothing in *Birklid* required that *every* employee exposed suffer injury, or that such injury be *immediately manifested*, that is what Boeing contends *Birklid* means. Br. of Petitioner at 12-19.[3] Boeing's formulation of the *Birklid* test effectively immunizes employers in Washington from deliberately exposing their workers to known injurious toxic substances so long as one worker, among all those exposed, does not immediately succumb to the toxic substance's. That is not the lesson to be

---

[1] "Substantial certainty" generally means that if a person knows that the consequences of his or her act are substantially certain to occur, that person is treated as if he or she desired to produce such consequences. *Id.* at 864-65.

[2] "Conscious weighing" is a test derived from Oregon law that focuses on whether the employer had an opportunity to consciously weight the consequences of his or her act and knew that someone, not necessarily the plaintiff, would be injured. *Id.* at 865. In *Gulden v. Crown Zellerbach Corp.*, 890 F.2d 195 (9th Cir. 1989), the court recognized that a direct action against an employer was authorized where the employer ordered workers to scrub PCBs from floor for five days after a spill without protective clothing or warnings regarding exposure hazards.

[3] This is reminiscent of Boeing's argument in *Birklid* that there is no deliberate intent to injure so long as the employer's injurious conduct "was reasonably calculated to advance an essential business purpose." *Id.* at 862. Under this formulation, virtually any deliberately injurious conduct by an employer was exempt from an RCW 51.24.020 action because conduct no matter how deliberately obtuse to its potential to injure workers could be justified to spur production or otherwise advance the employer's needs.

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learned from *Birklid* or case law since it was filed, nor does this argument represent sound public policy.

Vallandingham v. Clover Park School District, 154 Wn.2d 16, 109 P.3d 805 (2005) does not alter *Birklid.* It was not a toxic exposure case. There, a mentally disabled student injured several teachers. The student had injured other students and staff about 96 times during the school year, and seven of those injuries resulted in workers' compensation claims. *Id.* at 24. The Court held that the teachers could not show that the employer actually knew that they would suffer injury. *Id.* at 34. In effect, the employer could not predict the student's free will, and that unpredictability broke the causal chain between the employer's actions and the employee's injury.[4]

Since *Birklid,* employees have met the definition of deliberate intention when an employer knowingly and continuously exposed employees to hazardous chemicals after seeing the harmful effects of those chemicals. *See Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001) (holding that an employer acted intentionally when it knew cleaning chemicals caused rashes but still required employees to use

[4] The *Vallandingham* dissent questioned when, if ever, employers could be certain that future injury will occur, comparing the case to Daniel in the lion's den. King Darius there might escape tort liability for throwing Daniel into the lion's den, because Darius could not be certain that the lions would attack Daniel. *Id.* at 37-38 (Sanders, J., dissenting).

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them); *Baker v. Schatz*, 80 Wn. App. 775, 912 P.2d 501, *review denied*, 129 Wn.2d 1021 (1996) (holding that employer had actual knowledge that injury was certain when employees were exposed to chemicals and complained of breathing difficulties, skin rashes, nausea and headaches).

Neither *Hope* nor *Baker* contemplated that every employee exposed must be injured or that the injury be manifested immediately. In fact, in *Baker*, the employees were exposed to various chemicals. The opinion does not indicate every exposed employee was injured or that their injuries were immediately manifested. The *Baker* court stated: "General Plastics' supervisors knew that the employees were suffering from chemical-related illnesses and that, unless the working environment was changed, continuing injury was certain." 80 Wn. App. at 783. Immediate, universal injury due to exposure was not required. Similarly, in *Hope*, the plaintiff was exposed to harsh chemical cleaners for *seven months* at her workplace in a supermarket. Again, not every employee exposed suffered injuries.

In addition to *Birklid*, *Hope*, and *Baker* Washington law generally has recognized a special treatment concern about toxic exposure in the workplace and otherwise. Washington's Worker and Community Right to Know law, RCW 49.70, articulates a special concern for workers

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potentially exposed to toxic chemicals. RCW 49.70.010 sets forth the legislative findings for that Act:

> The legislature finds and declares that the proliferation of hazardous substances in the environment poses a growing threat to the public health, safety, and welfare; that the constantly increasing number and variety of hazardous substances, and the many routes of exposure to them make it difficult and expensive to monitor adequately and detect any adverse health effects attributable thereto; that individuals themselves are often able to detect and thus minimize effects of exposure to hazardous substances if they are aware of the identity of the substances and the early symptoms of unsafe exposure; and that individuals have an inherent right to know the full range of the risks they face so that they can make reasoned decisions and take informed action concerning their employment and their living conditions.
>
> The legislature further declares that local health, fire, police, safety, and other government officials require detailed information about the identity, characteristics, and quantities of hazardous substances used and stored in communities within their jurisdictions, in order to plan adequately for, and respond to, emergencies, enforce compliance with applicable laws and regulations concerning these substances, and to compile records of exposures to hazardous substances over a period of time that will facilitate the diagnosis, treatment, and prevention of disease.
>
> The legislature further declares that the extent of the toxic contamination of the air, water, and land in this state has caused a high degree of concern among its residents and that much of this concern is needlessly aggravated by the unfamiliarity of these substances to residents.
>
> The legislature therefore determines that while these substances have contributed to the high quality of life we enjoy in our state, it is in the public interest to establish a

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> comprehensive program for the disclosure of information about hazardous substances in the workplace and the community, and to provide a procedure whereby residents of this state may gain access to this information.

Similarly, Washington's citizens established an aggressive public policy by initiative to clean up the effects of toxic contamination in the Model Toxics Control Act, RCW 70.105D. The people declared the policy supporting that Act:

> (1) Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations.
>
> (2) A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state's water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers. The main purpose of chapter 2, Laws of 1989 is to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's land and waters.
>
> (3) Many farmers and small business owners who have followed the law with respect to their uses of pesticides and other chemicals nonetheless may face devastating economic consequences because their uses have contaminated the environment or the water supplies of their

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neighbors. With a source of funds, the state may assist these farmers and business owners, as well as those persons who sustain damages, such as the loss of their drinking water supplies, as a result of the contamination.

(4) It is in the public's interest to efficiently use our finite land base, to integrate our land use planning policies with our clean-up policies, and to clean up and reuse contaminated industrial properties in order to minimize industrial development pressures on underdeveloped land and to make clean land available for future social use.

(5) Because it is often difficult or impossible to allocate responsibility among persons liable for hazardous waste sites and because it is essential that sites be cleaned up well and expeditiously, each responsible person should be jointly and severally.

(6) Because release of hazardous substances can adversely affect the health and welfare of the public, the environment, and property value, it is in the public interest that affected communities be notified of where releases of hazardous substances have occurred and what is being done to clean them up.

RCW 70.105D.010.

In *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989), our Supreme Court held that exposure to asbestos qualified as an exposure to a hazardous substance under RCW 4.22.070(3)(a), thereby allowing a plaintiff to sue defendants for joint and several liability, notwithstanding the enactment of several liability for most torts in the 1986 Tort Reform Act. *Id.* at 667-69.

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These authorities evidence a special public policy in Washington law for those who are exposed to toxic substances generally and in the workplace. Washington law treats those exposed to toxic substances with special consideration for the harmful effects of such exposure. That special consideration should animate this Court's interpretation of deliberate intent to injure under RCW 51.24.030 for toxic exposure of workers by an employer.

Thus, under existing Washington law, Walston stated a cause of action for deliberate injury under RCW 51.24.020 when Boeing required him to be exposed to asbestos, knowing of the harm occasioned by asbestos exposure.

(2) Washington Is Alone in How It Defines "Deliberate Intention"

To better understand a deliberate intention claim under RCW 51.24.020, it is appropriate to consider how other jurisdictions address the deliberate intention concept. Most states have a similar statute to RCW 51.24.020 that allows workers to sue their employers for intentional torts. But states differ on how they define "deliberate intention" when employers expose their employees to hazards in the workplace.

No other jurisdiction follows the Washington definition of "deliberate intention" in the context of employer deliberately-intended

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torts. Many states have adopted the definition that comes from the *Restatement (Second) of Torts* § 8A (1965). That foundational definition states that a person acts with deliberate intention when that person "desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." *Id.* The *Restatement* gives the following example to provide clarity:

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. C is injured by the explosion. A is subject to liability to C for an intentional tort.

Id., Ills. 1. Though a host of unknown factors could have intervened to prevent injury to the stenographer, the bomb-thrower under the *Restatement*'s definition acts with sufficient knowledge and certainty for a court to find deliberate intention. As many as 12 states have adopted the *Restatement*'s definition including: Connecticut, Florida, Louisiana, Missouri, New Jersey, New York, New Mexico, North Carolina, South Dakota, Texas, and West Virginia.[5]

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[5] *See Sorban v. Sterling Eng'g Corp.*, 830 A.2d 372 (Conn. App. 2003); *Turner v. PCR, Inc.*, 754 So.2d 683 (Fla. 2000); *Bazley v. Tortorich*, 397 So.2d 475 (La. 1981); *Coello v. Tug Mfg. Corp.*, 756 F. Supp. 1258 (W.D. Mo. 1991) (applying Mo. law); *Kaczorowska v. Nat'l Envelope Corp.*, 777 A.2d 941 (N.J. App Div. 2001); *Delgado v. Phelps Dodge Chino, Inc.*, 34 P.3d 1148 (N.M. 2001); *Acevedo v Consolidated Edison Co*, 596 N.Y.S.2d 68 (N.Y. App. Div. 1993*) appeal dismissed without opinion,* 82 N.Y.2d 748 (1993); *Woodson v. Rowland*, 407 S.E.2d 222 (N.C. 1991); *Harn v. Cont'l Lumber Co.*, 506 N.W.2d 91 (S.D. 1993*)*; *Reed Tool Co. v. Copelin*, 689 S.W.2d 404 (Tex. 1985); *Hadley v. Union Carbide Corp.*, 804 F.2d 265 (4th Cir. 1986) (applying W. Va. Law).

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Some states still apply the more restrictive intent to injure standard rejected in *Birklid*. These jurisdictions require a plaintiff to show that the employer specifically intended to harm the employee. *See, e.g., Cole v. Fair Oaks Fire Prot. Dist.*, 729 P.2d 743 (Cal. 1987). Constructive intent is not enough. Rather, a plaintiff must show that the employer actually intended to harm the specific victim. *Id.* Thus, even the bomb-thrower from the *Restatement*'s illustration would not be liable in a specific intent jurisdiction.[6] The New Mexico Supreme Court rejected this test:

> The actual intent test provides immunity from tort liability for all injuries inflicted by the employer except those rare, practically unprovable instances in which it is the employer's purpose to injure the worker. Petitioner accurately observes that this standard provides employers virtually absolute immunity, and "an employer who knows his acts will cause certain harm or death to an employee may escape personal responsibility for an act by merely claiming that he/she hoped the employee would make it." Even more disturbingly, the actual intent test encourages an employer, motivated by economic gain, to knowingly subject a worker to injury in the name of profit-making. As long as the employer is motivated by greed, rather than intent to injure the worker, the employer may abuse workers in an unlimited variety of manners while still enjoying immunity from tort liability.

Delgado v. Phelps Dodge Chino, Inc., 35 P.3d 1148, 1154 (N.M. 2001).

In *Birklid*, Washington adopted a definition of deliberate intention that is something of a middle ground, differing both from the "specific

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[6] Specific intent jurisdictions apply the doctrine of transferred intent in employer tort cases. *See Rivera v. Safford*, 377 N.W.2d 187, 189 (Wis. App. 1985).

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intent" and the *Restatement* standards. An employer acts with "deliberate intention" under RCW 51.24.020 when it has actual knowledge that injury is certain to occur and "willfully disregard[s] that knowledge." 127 Wn.2d at 865-66. The *Birklid* court found that the employer (Boeing) acted with "deliberate intention" after it continued to expose workers to toxic resin even after workers experienced dermatitis, rashes, nausea, headaches, dizziness, and even passed out on the job. *Id.* at 856. There is no evidence in that opinion that each and every employee who worked in Boeing's shop fell ill from exposure. No other state appears to have adopted *Birklid's* approach.

(3) The *Restatement* Standard Should Apply in Toxic Exposure Cases

Washington prides itself on a "long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 582 (2000). In the industrial insurance setting, the *Birklid* court rejected the notion that "the blood of the workman is a cost of production." *Birklid*, 127 Wn.2d at 874.

But *Birklid's* formulation of deliberate intent to injure is not easy to apply and Boeing's articulation of the test, requiring universal injury to every person exposed and immediate manifestation of injury by those

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exposed would gut *Birklid*, leaving employers free to expose their employees to known toxic substances.

The requirement of immediate manifestation of injury is particularly pernicious. An example posed below was an employer directing an employee to handle radioactive material. There is little question that the employee would be injured by such exposure, even though the harm might be manifested later. The radioactive material example is not an idle one. In *Tulloh v. Goodyear Atomic Corp.*, 639 N.E.2d 1203 (Ohio App. 1994), the court authorized an action by an employee against his employer where that employer deliberately exposed him to radioactive materials. Ohio is a "substantial certainty" state. Similarly, in *Day v. NLO*, 851 F. Supp. 869 (S. D. Ohio 1994), a federal district court certified a class to pursue a direction action against an employer of nuclear weapons components that exposed the class members to radiation. The case presented difficult questions of law where the class members had not yet contracted cancer, but had emotional distress arising from their present fear that they would do so in the future.

Unfortunately, in toxic exposure cases, many of the health risks or diseases have long latency periods. This is certainly true for asbestosis and mesothelioma. *See Koslop v. Cabot Corp.*, 631 F. Supp. 1494 (M.D. Pa 1986) (authorizing direct action against employer for risk of

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contracting beryllium-related diseases). *See generally,* "Recovery for Exposure to Beryllium" 116 A.L.R. 6th 143 (2006) (collecting cases regarding beryllium exposure; 10 to 30 year latency period for beryllium-related lung disorders). *See also, Smith v. Monsanto Co.,* 882 F. Supp. 327 (S. D. W. Va. 1992) (direct action against employer for PAB exposure; PAB exposure results in diseases with long latency periods). A definition of deliberate intent that is more attuned to the realities of toxic exposure cases is in order.

As noted *supra,* Washington courts have evidenced a more liberal treatment of claims under RCW 51.24.020 involving toxic exposure, as is present in this case. The better definition of "deliberate intention" in the toxic exposure setting is that of the *Restatement* for such claims. First, not every person exposed to toxic substances will immediately manifest injury, particularly where such injuries may have a long latency period. Second, a substantial certainty standard would better deter employers from intentionally harming employees. Finally, increasing the tort liability on employers would efficiently alleviate pressure on occupational safety regulators like the Occupations Safety and Health Administration ("OSHA").[7]

[7] Or Washington's own workplace safety regulator, the Department of Labor and Industries Division of Occupational Safety and Health.

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Many employees face serious health risks at work, and workers' compensation may not sufficiently remedy the long term effects of occupational injury. The National Institute for Occupational Safety and Health estimates that toxic chemical exposure in the workplace accounts for four to ten percent of all cancer deaths in the United States; that is roughly 24,000 deaths annually. Elizabeth M. Ward et al., *Priorities for Development of Research Methods in Occupational Cancer*, 111 Environ. Health Perspect. 1-12, (2003), http://dx.doi.org/10.1289/ehp.5537. Mesothelioma and other cancers take *years* to develop, and do not show immediate symptoms. Thus, employees have difficulty proving that an employer actually knew that a carcinogenic hazard would certainly injure an employee. These diseases also require very expensive treatment. A statutorily fixed worker compensation settlement will not always cover the necessary treatment, and workers may go undercompensated without the ability recover in tort.

The intentional tort exception in Washington also fails to adequately deter employers from exposing their employees to hazards. Our Supreme Court recognized that one of the law's key purposes is deterrence. *Birklid*, 127 Wn.2d at 874 (citing *Provost v. Puget Power*, 103 Wn.2d 750, 753, 696 P.2d 1238 (1985)). One commentator notes that hazards in the workplace have changed, and employers can more easily

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conceal their wrongdoing. Michelle Gorton, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 Envtl. L. 811, 823 (2000). As discussed previously, many exposure injuries develop slowly, and employees do not always understand the substances they work with. Therefore, employers may decide to withhold information about a potential exposure hazard, especially if the potential injury will not show immediate symptoms. This Court could deter wrongdoing and incentivize employers to protect employees—thus fulfilling the purpose of the law—by adopting the *Restatement's* definition of deliberate intent in the toxic exposure setting.

Adopting a broader definition of intent would help to regulate workplace safety more efficiently. OSHA currently oversees occupational safety regulation, but struggles with the growing need for regulation and the lack of public funds needed to oversee employee safety. Michelle Gorton, *Intentional Disregard: Remedies for the Toxic Workplace*, 30 Envtl. L. 811, 832 (2000). Commentators have noted that expanding tort liability will incentivize employers to comply with OSHA regulation, even when OSHA cannot perform frequent inspections. *Id.* at 838-40. And as the *Birklid* court stated, innocent employers should not bear the insurance cost of employers who wrongfully injure employees. *Birklid*, 127 Wn.2d at 874. Making employers pay for injuries occasioned by toxic exposure

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that are substantially certain to occur, presents an economically efficient means to regulate occupational hazards. Employers under the current system have incentive to expose workers to hazards—even when injury is substantially likely to result—and let the insurance safety net bear the cost.

D. CONCLUSION

Walston has established a claim under RCW 51.24.020 under *Birklid's* definition of deliberate intent to injure. But Washington's definition of "deliberate intention" for employer torts is as unique as it is inadequate in the toxic exposure setting. The *Restatement* definition better addresses modern workplace toxic injuries, deters employers from intentionally injuring employees, and efficiently supports occupational safety. For these reasons, this Court should apply the *Restatement's* definition of deliberate intention for claims under RCW 51.24.020 in the toxic exposure setting. This is consistent with a growing number of states that have done so generally in deliberate injury cases.

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DATED this 26th day of October, 2012.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of the Motion for Leave to File Brief of Amicus Curiae and Brief of Amicus Curiae Washington State Labor Council in Court of Appeals Cause No. 42543-2-II to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 26, 2012, at Tukwila, Washington.

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